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A MISAPPLICATION OF THE DOCTRINE OF ESTOPPEL.

The writer of this paper in the course of his practice has frequently had to deal with a certain line of decisions in the State of New York. The courts of New York have persistently insisted that these decisions are sustainable upon the doctrine of estoppel. The writer has at present no interest in affirming or denying the correctness of these decisions. His only interest is to draw attention to what seems to him a misapplication therein of the doctrine of estoppel.

The earliest of these decisions is that in North River Bank *v.* Aymar & others, Execs., etc.,[1] a case decided in 1842 by the Supreme Court, then composed of Chief Justice Nelson and Justices Cowen and Bronson. Justice Cowen wrote the prevailing opinion, in which Justice Bronson concurred. Chief Justice Nelson wrote a dissenting opinion.

The Bank sued Aymar and Embury, executors of Pexcel Fowler, deceased, on eleven promissory notes. Six were signed: "Pexcel Fowler—Jacob D. Fowler, att'y." Four of these were payable to the order of David Rogers & Son and endorsed by them. Two were payable to the order of Jacob D. Fowler and endorsed by him and by David Rogers & Son. The other five notes were made by Jacob D. Fowler, were payable to the order of Pexcel Fowler and endorsed: "Pexcel Fowler—Jacob D. Fowler, atty." They were also endorsed by David Rogers & Son. Pexcel Fowler by power of attorney had authorized Jacob D.

[1] (1842) 3 Hill 262.

Fowler to make and endorse notes for him. Nine of the notes were made not in the business of Pexcel Fowler but for the accommodation of David Rogers & Son under an agreement between them and Fowler, Gordon & Co., of which firm Jacob D. Fowler was a member, for the exchange of accommodation paper. Fowler, Gordon & Co. failed, leaving notes made and endorsed under this agreement on which David Rogers & Son were liable and which plaintiff had discounted. David Rogers & Son procured the notes in question and passed them to plaintiff in exchange for the notes of Fowler, Gordon & Co. Defendants admitted that plaintiff was entitled to recover on two of the notes. As to the others the Court charged that Jacob D. Fowler exceeded his authority, that the power being special, plaintiff was affected by the excess and, therefore, not entitled to recover.

Justice Cowen argued that, as the notes had been received by plaintiff in exchange for the notes of Fowler, Gordon & Co. it was a *bona fide* holder thereof for value; that the power of attorney authorized Jacob D. Fowler to make and endorse notes only in the business of Pexcel Fowler and plaintiff was apprised of such limitation of his authority; but that the attorney in making and endorsing notes which purported to be made and endorsed in conformity with the power impliedly represented that they were made and endorsed in the business of the principal and the principal was thereby estopped to deny that the authority had been pursued.

After a review of certain authorities Justice Cowen said:

"These cases respecting the limited powers of agents to make indorsements, accord with the proposition concerning powers in general as it was submitted to us by the counsel for the plaintiff in error; viz.: 'Whenever the very act of the agent is authorized by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent. Such persons are not bound to inquire into facts *aliunde*. The apparent authority is the real authority.'"[1]

In his dissenting opinion Chief Justice Nelson argued

[1] 3 Hill 270.

that the attorney's power was limited to making and endorsing notes in the business of the principal, and that plaintiff knew it; that, therefore, the plaintiff must show that the notes were given in the business of the principal. To the claim that the attorney by making and putting the notes in circulation virtually affirmed they were made in the business of the principal and hence within the scope of his power, he answered that this implied representation of the agent was merely an unauthorized declaration by the agent as to the scope of his power which could not enlarge his authority and could not bind his principal.

Justice Cowen, as will be seen, rested the decision mainly upon the proposition that, while the act of the agent was not within his *actual* authority, it was within his *apparent* authority and, therefore, bound the principal. Still the germ of the theory of estoppel which was subsequently developed is to be traced in his opinion.

The question involved in North River Bank *v.* Aymar came before the Court of Appeals in 1856 in the Mechanics' Bank *v.* The New York & New Haven Railroad Co.[1] Robert Schuyler, transfer agent of defendant, had issued to Kyle a certificate for eighty-five shares of defendant's stock. Plaintiff had discounted Kyle's note for $12,000 and received from him this certificate as part collateral. Prior to the issue of this certificate no stock had been assigned to Kyle upon defendant's books and no outstanding certificate of stock had been surrendered to the defendant. The certificate was spurious and known to Kyle to be such and the money borrowed of plaintiff by Kyle had been borrowed for Schuyler. Plaintiff presented the certificate to defendant and demanded a transfer to it of the stock upon defendant's books; the demand was refused because the certificate was spurious. Plaintiff then sued defendant in the Superior Court of the City of New York to recover as damages the par value of eighty-five shares of stock with interest from the date of the loan to Kyle. The action was tried without a jury by Justice Bosworth and resulted in judgment for plaintiff, which was affirmed at General Term. On appeal by the defendant the Court of Appeals reversed the judgment and ordered a new trial.

[1] (1856) 13 N. Y. 599.

Judge Comstock wrote the opinion of the Court and rested the decision upon two grounds: First, that the certificate in Kyle's hands was void and gave him no rights against defendant and, as the certificate was not a negotiable instrument, plaintiff got no greater rights against the defendant than its assignor had; second, that, as the transfer agent had issued the certificate without the transfer to Kyle of any stock upon the defendant's book and without the surrender of any outstanding certificate he had acted without authority, that plaintiff was chargeable with notice of the limitation of the agent's authority and, as the agent's act was in fact unauthorized, though plaintiff did not know it, he could not recover.

Judge Comstock called attention to the fact that the decision of the Supreme Court in North River Bank *v.* Aymar had been reversed by the Court of Errors, but that the case in that Court had never been reported.

The following quotations from Judge Comstock's opinion will display his reasoning:

"All that can be said in behalf of the plaintiffs is, that the certificate itself implied a representation or assurance that it was issued within the power; in other words, that the conditions on which the power depended had been fulfilled. Even this representation, when closely scanned, was no more than an inference of the dealer that, as the agent had no authority to certify except under conditions, those had been in fact performed. But the conclusive answer is, that the defendant never authorized any such representation. To say that it had, would be simply saying that it authorized the certificate, because the representation was contained in that and existed nowhere else; and this would be assuming the very point in dispute. The representation or assurance, therefore, if such we call it, was the unauthorized act of the agent. Upon this the plaintiffs naturally, no doubt, relied. * * * The precise difficulty is, that they relied upon the appearance which the agent gave to the act, and by that they were deceived. They were under no deception as to the power in its real or apparent scope."[1]

Of the doctrine of estoppel Judge Comstock said: "The notion of estoppel, * * * deserves, by itself, very little consideration. Every corporate as well as private obligation or instrument undoubtedly contains an express or implied representation of facts, upon the faith of which innocent parties may deal. * * * Where the instrument is not negotiable, the maker may, as I have heretofore observed, be affected by an estoppel *in pais*, if it be transferred upon his representation of its validity, and the dealer acts upon that representation. But to say that he is estopped by the instrument itself, simply because he made it and a third party has

[1] 13 N.Y., 636, 637.

dealt with it, is only asserting in another form that fraud, mistake, duress, illegality, want of consideration or want of authority, when the act is one of pretended agency, is no defense. This would subvert the settled maxim that the assignee or purchaser takes subject to all equities between the original parties. It would also subvert another maxim which belongs to the doctrine of estoppel itself. That maxim is, that an admission or representation is no estoppel in favor of a stranger to whom it is not made, and whose conduct it was not expressly designed to influence."[1]

All of the judges concurred with Judge Comstock except Judge Samuel L. Selden who is stated to have taken no part in the decision.

In The Farmers & Mechanics' Bank, of Kent County, Maryland *v.* The Butchers & Drovers' Bank,[2] the Court of Appeals in 1857 was called again to consider this question. Plaintiff sued defendant in the Superior Court of the City of New York to recover the amount of five checks drawn upon defendant by one Green, payable to the order of Spencer, plaintiff's cashier, all dated February 16, 1852; three were for $1,000 each and two for $1,500 each. They were certified as good by Peck, defendant's paying teller. They were in fact over-certifications. Plaintiff was a holder for value without notice. A verdict was rendered for plaintiff and the judgment entered thereon was affirmed at General Term and on appeal by defendant the judgment was affirmed by the Court of Appeals. Judge Samuel L. Selden delivered the prevailing opinion. Chief Judge Denio also delivered an opinion in favor of affirmance. Judge Comstock delivered a dissenting opinion.

Judge Selden reasoned thus. Defendant's paying teller had no authority to certify checks without funds of the drawer. By certifying the checks of Green he impliedly represented that the defendant had funds to meet the checks. This was, it is true, a false and unauthorized representation. Plaintiff relied upon this false representation supposing it to be true and parted with value in reliance thereon. As the act of the agent appeared to be within the agent's authority the plaintiff had the right to rely upon its appearance and the defendant is estopped to deny that its agent's representation was true, and that it did not have funds with which to pay the checks.

[1] Id. 638. [2] (1857) 16 N. Y. 125.

Judge Selden's position is set forth in the following quotations:

"The certificate of the teller is a positive representation that the bank has funds to meet the check. If that representation is false, who ought to bear the loss?"[1] "There is a plain distinction between the terms of a power and facts entirely extraneous, upon which the right to exercise the authority conferred may depend. One who deals with an agent has no right to confide in the representation of the agent as to the extent of his powers. . . . But in regard to the intrinsic fact, whether the bank has funds or not, the case is different. . . .

"It is, I think, a sound rule, that where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular, in regard to which such party has or is presumed to have any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it. The familiar case of the giving of a negotiable partnership note, by one of the partners, for his own individual benefit, affords an apt illustration of this rule. . . . If he gives the partnership note or acceptance for his own debt, it is void in the hands of any party having knowledge of the consideration for which it is given; but when negotiated to a bona fide holder, the firm is precluded from questioning the authority of the partner, and is effectually bound."[2]

"The question is not, in such cases, whether the principal is bound by the unauthorized act of the agent, but whether he is estopped, by the representation of the agent, from disputing facts which show that the act was authorized."[3]

The pith of Judge Comstock's dissenting opinion is found in these words: "It should now be observed further, that an agent may clothe his unauthorized acts in the same form as those which are authorized, and still the principal will not be liable. To charge the principal, the acts must be of the same character, not merely in appearance, but in their substance and nature. Thus, an authorized acceptance by an agent upon funds of the drawer is the same in appearance as an unauthorized one for the accommodation of a stranger. In the latter case the false appearance is derived wholly from the false representation of the agent. But as the principal has not authorized the act, so he has not the representation."[4]

The reader will observe that nothing in the opinions in this case was intended in anywise to affect the decision in

[1] 16 N. Y. 133. [2] Id, 134, 135. [3] Id. 136. [4] Id. 150.

the Mechanics' Bank *v.* The New York & New Haven Railroad Co.[1] so far as that decision rested upon the ground that, as the certificate for eighty-five shares issued to Kyle was void in his hands and gave him no rights against the defendant, plaintiff, Kyle's assignee, got no greater rights than Kyle. So far, however, as the decision in that case rested upon the ground that the stock certificate was unauthorized and, therefore, could not bind the principal it was repudiated.

Judge Samuel L. Selden and Judge Comstock had both been elected to the Court of Appeals in November, 1855. This case affords but one of several exhibitions of the difference of views held by these vigorous thinkers during their service upon that Court.

The question under discussion came before the Court of Appeals once more in 1862 in Griswold *v.* Haven.[2] John Wright & Co. kept warehouses in Brooklyn for the storage of grain. In May and June, 1848, John Wright, a partner in the firm, issued to Ford & Son warehouse certificates for grain of the value of $6,000. Plaintiff loaned to Ford & Son $4,865 upon said receipts as collateral. John Wright went with Ford to plaintiff, introduced him as a person having grain in store who wanted an advance upon it and stated, in reply to plaintiff's inquiry, that the grain was in good order and all right. Ford then assigned the receipts and plaintiff made the advance requested. Plaintiff having demanded the grain and the defendant having refused to deliver it, sued defendant in the Supreme Court in an action of trover. A verdict was rendered for the plaintiff and the judgment entered thereon was reversed at General Term. On appeal by the plaintiff the Court of Appeals reversed the order and directed judgment for plaintiff.

Judge Henry L. Selden, who had succeeded Samuel L. Selden, delivered the opinion of the Court. Chief Judge Denio delivered a dissenting opinion. Judges Davies and Wright also dissented.

Judge Selden reached the conclusion that the defendants were liable to plaintiff upon the ground that, while Wright had made the plaintiff a false and unauthorized

[1] 13 N. Y. 599. [2] (1862) 25 N. Y. 595.

representation that defendants had in store for Ford & Son the grain called for in the warehouse certificate, yet the defendants were estopped to deny that such representation was true and that they did not have such grain in store for Ford & Son.

After reviewing certain authorities he stated this conclusion: "These cases, therefore, must be considered as establishing the doctrine, that where the authority of an agent depends upon some facts outside the terms of his power, and which, from its nature, rests particularly within his knowledge, the principal is bound by the representation of the agent, although false, as to the existence of such fact. There is no difference in this respect between the liability of the principal for the fraud of his agent, and that of a partnership for the fraud of one of its members."[1] The Judge then added: "The mode in which the liability is enforced in all these cases is by *estoppel in pais*. The agent or partner has in each case made a representation as to a fact essential to his power, upon the faith of which the other party has acted, and the principal or firm is precluded from controverting the fact so represented."[2]

It should be noted by the reader that the representations by which the defendants were held estopped in this case were not the written representations contained in the warehouse receipts, but the oral representations made by Wright directly to plaintiff. "I have no hesitation, therefore," said Judge Selden, "in holding that, under the circumstances of this case, the defendants were bound by the representations of Wright—I mean the verbal representations, and not the representations contained in the receipts."[3]

Thus far the Courts of New York have drawn a sharp distinction between negotiable instruments in the true sense such as were involved in North River Bank *v.* Aymar,[4] and The Farmers & Mechanics' Bank *v.* The Butchers & Drovers' Bank,[5] and stock certificates and warehouse receipts which were involved in the Mechanics' Bank *v.* The New York & New Haven Railroad Co.,[6] and Griswold *v.* Haven.[7] In the last two cases it was held that the as-

[1] 25 N. Y. 602. [2] Id. 603. [3] Id. 607. [4] 3 Hill 262.
[5] 16 N. Y. 125. [6] 13 N. Y. 599. [7] 25 N. Y., 595.

signees of stock certificates and warehouse receipts got no greater rights than the persons had to whom the certificates of stock and warehouse receipts had been originally issued.

Speaking of Mechanics' Bank *v.* New York & New Haven Railroad Co., Judge Selden said:

"The alleged fraud consisted in issuing to one Kyle a spurious certificate for eighty-five shares of the capital stock of the Company, and thus falsely representing that Kyle was the owner of such stock, when in truth he owned no stock, and was not entitled to the certificate. Kyle had borrowed money of the plaintiff, and assigned the certificate as security.

"It was a sufficient answer to the action, that Kyle, to whom the certificate was issued, being privy to the fraud, had, of course, no claim against the Company, and that his assignees could have no greater rights than himself."[1]

It was left to the case of New York & New Haven Railroad Company *v.* Schuyler and others,[2] decided in 1865 to break down this distinction. The suit was one in equity against Schuyler and several hundred other defendants, holders of alleged false and fraudulent certificates and transfers of pretended stock of plaintiff company issued by Schuyler, plaintiff's transfer agent, to have the same adjudged spurious and void and cancelled, and the holders thereof enjoined from prosecuting actions then pending, and from bringing other actions against plaintiff to enforce such certificates and transfers or to recover damages from the plaintiff. Many of the defendants by way of counterclaim sought to recover from the plaintiff in said action as damages the moneys which they had advanced in good faith upon such certificates as collateral or which they had paid as the purchase price for such certificates.

The Supreme Court at Special Term had permitted a recovery against the plaintiff of damages by many of the defendants. The General Term and the Court of Appeals both affirmed the action of the Special Term in this respect.

Judge Noah Davis delivered the opinion of the Court. On the question of privity he wrote as follows:

"On the question of *privity* in any view of this case, I have no difficulty. If the act of the agent can be charged home upon any principle, upon the corporation, then, as was said in the Bank of Kentucky *v.* The

[1] 25 N. Y., 597, 598. [2] (1865) 34 N. Y. 30.

Schuylkill Bank (1 Pars. Eq. Cas., 180), 'the *bona fide* holder of any certificate issued by the transfer agents has a primary and direct claim, either to be admitted as a corporator, or if that is impracticable, from the excessive issue of stock, to be compensated for the fraud practiced upon him.' To entitle the aggrieved party to sue, in such case, no privity is necessary, except such as is created by the unlawful act and the consequential injury, because the injured party is not seeking redress upon contract, but purely for the tortious act in the commission of which the contract is an accidental incident." [1]

On the question of estoppel Judge Davis said: "We * * * with confidence declare the true doctrine of this branch of the law of agency to be, that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself the representation, a third person dealing with such agent in entire good faith pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice." [2]

Since this decision the distinction in this class of cases between negotiable and *quasi* negotiable instruments, such as certificates of stock, warehouse receipts and bills of lading has been done away with and the rights of a holder in good faith and for value of such instrument is no longer limited to the rights of the person to whom the instrument was originally issued.

The reader will also notice that the decision in this case repudiated the only ground for the decision in the Mechanics' Bank *v.* The New York & New Haven Railroad Company,[3] which had not been repudiated in Farmers and Mechanics' Bank *v.* Butchers & Drovers' Bank.[4]

We now pass to the Bank of Batavia *v.* New York, Lake Erie & Western Railroad Co.,[5] decided in 1887. Weiss, local freight agent of defendant at Batavia, N. Y., issued bills of lading to one Williams for sixty-five barrels of beans. I. T. Comstock, N. Y., was named as consignee. Williams drew a draft on the consignee and the plaintiff discounted it and accepted a transfer of the bills of lading as security. The defendant never received the beans. Plain-

[1] Id. 60. [2] Id. 73. [3] 13 N. Y. 599. [4] 16 N. Y. 125.
[5] (1887) 106 N. Y. 195.

tiff sued defendant to recover as damages the money advanced to Williams with interest thereon.

Judge Finch delivered the opinion of the Court and said:

"It is a settled doctrine of the law of agency in this State that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself the representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice. * * * The application of this rule to the case at bar has determined it in favor of the plaintiffs and we approve of that conclusion."[1]

An examination of the complaint in the papers on appeal reveals these facts. The complaint contained two causes of action. The first cause of action was set forth in five paragraphs. Paragraph I alleged that plaintiffs and defendants were domestic corporations. Paragraph II stated that on March 7, 1881, at Batavia, defendant made and delivered to one Williams a bill of lading dated that day stating in substance that it had received from Williams thirty-five barrels of beans which he had agreed to forward from Batavia to New York and deliver to Comstock; that said bill of lading was signed by defendant's agent duly authorized for that purpose and the property, had it been shipped as stated in the bill of lading, would have been of the value of $200. Paragraph III averred that on March 7, 1881, Williams made his draft dated that day directed to Comstock, whereby fifteen days from date for value received, he requested Comstock to pay the Bank of Batavia $175. Paragraph IV set forth that on March 7, 1881, Williams requested plaintiff to discount said draft and offered as security said bill of lading, and plaintiff relying upon the truth of the statements in said bill of lading, and believing them to be true did discount said draft and pay Williams the full amount thereof, less the discount for the time the draft had to run, and Williams assigned to plaintiff said bill of lading. Said paragraph further alleged presentment of said draft for acceptance and payment and refusal thereof, and that said draft remained due and unpaid. In paragraph V plaintiff

[1] Id. 109.

alleged that "said bill of lading was in fact a false and fraudulent one; that the said defendant had not at the date thereof, or at any other time, received from the said Williams thirty-five barrels or any other quantity of beans for shipment from Batavia to the said Comstock at the City of New York as stated in said bill of lading. That by reason of the premises the said plaintiff has suffered damages to the amount of the said draft and interest thereon from the date it became due as aforesaid."

The allegations of the second cause of action were precisely similar, the only difference being that the bill of lading set forth therein was for thirty instead of thirty-five barrels of beans.

In view of the character of the action and the allegations of the complaint, the application of Judge Finch's statements as to estoppel will doubtless be appreciated by the reader.

The Court of Appeals of New York has, however, gone still further in its application of the doctrine of estoppel to this class of cases.

The American Dock & Trust Company was carrying on a warehouse business with offices in New York City and warehouses on Staten Island. Its president, M. W. Stone, was authorized by resolution of its Board of Directors, to issue warehouse receipts. He issued warehouse receipts to himself for cotton when he had none on storage. Three different banks in New York City discounted Stone's notes and accepted from him as collateral these fictitious warehouse receipts endorsed by him in blank.

The Bank of New York National Banking Association sued the Dock Company in an action of deceit to recover as damages the amount of its loan to Stone and interest.[1] At the trial the plaintiff proved no authority to Stone to issue warehouse receipts except the said resolution of its Board of Directors. The Court of Appeals held that this resolution conferred no authority upon Stone as president to issue warehouse receipts to himself even for actual cotton he might have on storage with the company.

Judge Peckham, however, said that had Stone issued a similar warehouse receipt to some person other than him-

[1] (1894) 143 N. Y. 559.

self, though no cotton was in store, the defendant would have been bound and upon the principle decided in Bank of Batavia *v.* Railroad Co.[1] "That principle," he said, "is that where an agent has been clothed by his principal with power to do an act, in case of the existence of some fact peculiarly within the knowledge of the agent, and where the doing of the act is in itself a representation of the existence of that fact, the principal is estopped from denying its existence as against third parties, dealing with the agent in good faith and in reliance upon the representation."[2] He then added: "I also think that if the by-law clothed Mr. Stone, the president, with general authority to issue receipts to himself for cotton which he actually deposited, if with such authority he issued a receipt where he had not in fact deposited any cotton, the defendant would be liable to respond to a *bona fide* holder for value of such receipt."[3]

Afterwards the Hanover National Bank sued the Dock Company.[4] On the trial evidence was offered to show that Stone had in fact several years before actual cotton on storage with the defendant on three separate occasions and had then issued to himself warehouse certificates for that cotton. The Court of Appeals held that this evidence was sufficient to warrant a jury in finding that Stone as president had actual authority to issue warehouse receipts to himself for actual cotton on storage with the defendant, and also held that if he issued warehouse receipts to himself when he had no cotton on storage and transferred them to the Hanover National Bank as collateral for money loaned the defendant was estopped from denying the truth of the representations of Stone, as its agent, that he had the cotton called for in the warehouse receipts and that it was liable to the plaintiff for the damages suffered by it in reliance on such receipts.

The Corn Exchange Bank of New York also sued the Dock Company to recover as damages what it had loaned to Stone in reliance upon similar warehouse receipts.[5]

Judge Vann laid down the same doctrine. After speaking of the evidence from which the jury might have found that Stone had authority to issue warehouse receipts to himself for cotton actually on storage with the defendant,

[1] 106 N. Y. 195. [2] 143 N. Y. 563. [3] Id. 563.
[4] (1896) 148 N. Y. 612. [5] (1896) 149 N.Y. 174.

Judge Vann said: "If it had been found as a fact that the power existed, the actual presence of the cotton on deposit would have been immaterial, as the defendant would be estopped from denying it."[1]

The doctrine of these cases may be stated thus: Where the right of an agent to exercise his authority depends upon the existence of extrinsic facts and the exercise of the authority is itself an express or implied representation by the agent that such extrinsic facts exist and the agent exercises his authority where such extrinsic facts do not exist, the principal is estopped to deny the truth of the agent's representation that such facts do exist, and is, therefore, bound by such representation, to any person who has parted with value in reliance upon the agent's representation and has acted in good faith. Where, however, it appears that the agent has acted for his principal in a transaction with himself individually, good faith, according to the Court of Appeals of New York, calls for no inquiry to ascertain whether the agent has in fact been impelled by his individual interests to abuse the authority conferred upon him by his principal.

In respect of this position of the New York Courts we offer the following observations:

It is not easy to see how a principal can be estopped by a representation of his agent which is concededly false and unauthorized. That a principal may be estopped to deny the truth of his agent's representation when he has himself stated that such representation is true and some person in reliance upon such statement of the principal has acted upon the representation of the agent and suffered damage is a doctrine that is intelligible. But when the agent makes a representation and the principal has done nothing to induce one to believe it to be true and to rely upon it, the principal cannot be estopped thereby. If the representation binds the agent it must be upon some theory of agency and not upon any theory of estoppel.

The reader must have noted that the liability of the principal in this class of cases does not necessarily rest upon an application of the doctrine of estoppel. In the Bank of Batavia *v.* The New York, Lake Erie & Western Railroad Company,[2] the action was one of deceit. The plaintiff in its complaint alleged that the bill of lading was

[1] Id. 181. [2] 106 N. Y. 195.

a false and fraudulent one and that the defendant had never had in its possession the beans called for therein. It seems superfluous to say that the principal cannot be estopped to deny the truth of his agent's false and unauthorized representation when the plaintiff has alleged the falsity of such representation and made the alleged falsity one of the vital elements of its claim to recover damages against the principal. Yet it was in just this case that we find Judge Finch saying: "It is a settled doctrine of the law of agency in this State that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice"[1] and then adding the remark: "The application of this rule to the case at bar has determined it in favor of the plaintiff and we approve of that conclusion."[2]

Surely if the plaintiff can deny the truth of the agent's representation and make its very want of truth the basis of recovery, the principal cannot be refused the right to assert its falsity. The principal in such a case is bound, if at all, not because of the assumed truth of the representation, but just because it is false, and the plaintiff has, assuming it to be true, acted on such assumption to his detriment. The action is one of deceit, and the falsity of the agent's representation is an essential element in such an action.

The same comments are with equal force applicable to much said by Judge Peckham in case of Bank of New York *v.* American Dock & Trust Co.[3] The complaint in that action was one in deceit, and, as the writer is credibly informed, was drafted upon the complaint in the Bank of Batavia case as a model.

But if the doctrine of estoppel is so little necessary and applicable in such cases, how much less applicable is it to cases such as those against the American Dock & Trust Company, where every warehouse receipt issued by the agent showed upon its face that the agent had acted for his

[1] Id. 199. [2] Id. 200. [3] 143 N. Y. 559.

principal in a transaction with himself, and that, therefore, his individual interest may have tempted him to misuse his authority for his own benefit.

In this connection we would call attention to the attitude of the Supreme Court of Georgia upon a similar question and contrast it with that of the Court of Appeals of New York.

The Planters Rice-Mill Company was engaged in the storage of rice. Its superintendent, W. T. Owen, had authority to issue warehouse receipts for rice actually received on storage. He issued warehouse receipts to one Schley which were fictitious. The Merchants' National Bank of Savannah loaned money to Schley and accepted a transfer of these receipts as collateral. The Bank afterwards demanded the rice of the Planters Rice-Mill Company and that Company refused to deliver it on the ground that it had never had it on storage. The Bank then sued the Planters Rice-Mill Company and recovered a judgment, which was affirmed on appeal by the Supreme Court of Georgia.[1]

Chief Justice Bleckley, delivering the opinion of the Court, said: "An agent to tell the truth may bind his principal by telling a lie. A wrongful exercise of delegated authority is not the assumption of authority, but the abuse of it. Thus, an agent empowered to issue and acknowledge receipts of a given kind, based on real transactions, does not, by wrongfully issuing and acknowledging receipts of a like kind, based on fictitious or simulated transactions, pass beyond the scope of his authority, but acts fraudulently within it. To hold otherwise would be to rule that an agent cannot commit a fraud and affect his principal by it. Here he had a rightful authority to do a certain class of acts. He did a number of those acts by the wrongful exercise of that authority. His principal must be responsible both for the authority conferred and for its faithful exercise, in so far as there is a right to rely upon the fidelity of its exercise."[2]

It further appears that Olmstead & Company sued the Planters Rice-Mill Company and based their action upon two sets of warehouse receipts.[3] They had loaned money to Schley on fictitious receipts issued to him by Owen, the

[1] (1887) 78 Ga. 574. [2] Id. 584, 585. [3] Id. 586.

defendant's superintendent. They had also loaned money to Owen upon receipts issued directly to them by Owen as superintendent for rice which he represented to them he had on storage with the defendant. If instead of issuing the receipts to Olmstead & Company he had issued them to himself and endorsed them to Olmstead & Company, the legal effect of the transaction would have been the same.

The Supreme Court of Georgia in the last case permitted a recovery for the money which Olmstead & Company had loaned to Schley, but refused to permit a recovery for the money loaned to Owen.

Judge Blandford, delivering the opinion of the Court, said: "We think that when Owen, the superintendent, wished to borrow money on his own account, and represented that he had this rice in the mill belonging to himself, it put Olmstead & Co. on notice to inquire whether that was the truth or not. They were dealing with him individually, and when they got him, as the superintendent of the Planters Rice-Mill Co. to issue this receipt as superintendent, and to sign that acknowledgment as superintendent, they were bound to know whether there were any such rights in that mill or not. They were put upon notice. They were not dealing with the rice mill Company in its corporate capacity, nor with Owen as its agent. * * * Owen could not deal with Olmstead & Company in two capacities, both as an individual and as superintendent of that Company; and we do not think the Company is bound by this receipt and acknowledgment of Owen."[1]

It was assumed in these cases that Owen, the superintendent, had as much authority to issue receipts to himself for rice actually on storage for his own account, as he had to issue receipts to persons other than himself, but that good faith in the case of receipts issued by him as agent to himself required an inquiry which was not required in the case of receipts issued to persons other than himself.

We submit that the distinction here drawn is a sound one, and that the position taken by the Court of Appeals of New York can find no justification either in the principles of law or in sound morals.

THADDEUS D. KENNESON.

NEW YORK.

[1] Id. 587, 588.